Nos. 83-141, 83-283

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,

Appellants,

—v.—

FRANK E. MIDKIFF, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether a federal court may hold facially void, for want of public use or purpose, a state statute authorizing takings in eminent domain, of land formerly available only under long-term leases, for ultimate purchase at fair value by those who live there—a statute enacted in order to end the severe economic distortion and widespread social hardship the state legislature found had arisen from a uniquely enduring concentration of land ownership in the hands of a few.

2. Whether a federal court may proceed to invalidate a state eminent domain statute on federal constitutional grounds despite pending state condemnation proceedings in which the federal plaintiff has invoked those federal grounds and has also argued that state law independently requires both the taking agency and state courts to reject the state legislature's findings of public use and purpose.*

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* The state defendants below were the Hawaii Housing Authority (hereinafter, "HHA" or "the State"), the Commissioners of the HHA (Paul A. Tom, Tony Taniguchi, Wilbert K. Eguchi, Wayne T. Takahashi, Lawrence N.C. Ing, Nobuyoshi Tamura, Andrew I.T. Chang, and David C. Slipher), and the Executive Director of the HHA (Franklin Y.K. Sunn). Commissioners Tom, Tamura, and Chang have been succeeded by Commissioners George Costa, William A. Knutson, and John Spierling, and Mr. Tom has succeeded Mr. Sunn as Executive Director.

Intervenors-defendants given leave to intervene by the district court below were the following lessee associations: Wai-Kahala Tract "H" Association, Inc.; Halawa Hills Landsale Committee; Awakea Association; Alii Shores Community Association; Enchanted Hills, Unit I; Portlock Community Association (Maunalua Beach)†; Kokohead Community Lease-Fee, Inc.†; West Marina Community Association†; Kalama Valley Community Association; Maunalua Triangle-Koko Kai Community Association, Inc.; Hahahione Valley Community Association, Inc.†; Kamiloiki Community Association; Lunalilo Marine Community Association; Mariners Ridge and Cove Fee/Lease Conversion Committee; Spinnaker Isle Association; Waialae Iki Community Association; Waiau Community Association; Kahala Community Association, Inc.; Kahala Community Fee Purchase Fund; and Halawa Valley Estates Fee Conversion Corporation. (Those marked with a "†" are filing a separate brief in No. 83-236, which is consolidated with Nos. 83-141 and 83-283.

(footnote continued)

Plaintiffs below were the Trustees of the Bishop Estate (hereinafter, "Bishop Estate" or "Estate"): Frank E. Midkiff, Richard Lyman, Jr., Hung Wo Ching, Matsuo Takabuki, and Myron B. Thompson. Mr. Ching has since been succeeded by William S. Richardson. Mr. Midkiff was deceased shortly after the filing of this appeal; his successor has not yet been appointed.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, dated March 28, 1983, from which this appeal is taken, is reported at 702 F.2d 788 (9th Cir. 1983) (per Alarcon and Poole, JJ.; Ferguson, J., dissenting), and is reprinted in the Appendix to the Hawaii Housing Authority's Jurisdictional

Statement at A1-63.* The Ninth Circuit decision reversed a judgment of the United States District Court for the District of Hawaii (per King, J.) (JA106-08), granting partial summary judgment to appellants (*id.* at ¶ 6). The opinion announcing that judgment, dated December 19, 1979, is reported at 483 F. Supp. 62 (D. Haw. 1979), and is reprinted at A64-76. The district court's decision on appellees' motion for preliminary injunction, dated May 8, 1979, is reported at 471 F. Supp. 871 (D. Haw. 1979), and is reprinted at A77-104.

JURISDICTION

The Bishop Estate brought this action for declaratory and injunctive relief in the United States District Court for the District of Hawaii under 28 U.S.C. §§ 1331, 1343, & 2201, and 42 U.S.C. § 1983. The district court granted partial summary judgment to the state defendants and the intervenors-defendants, rejecting the Estate's claim that the Hawaii Land Reform Act violated the Fifth and Fourteenth Amendments to the United States Constitution. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, declaring the Hawaii Land Reform Act invalid on its face. A105. Rehearing was denied June 17, 1983. A106. Appellants filed timely Notices of Appeal to this Court in the United States Court of Appeals for the Ninth Circuit on July 15 and 19, 1983. JA166-68. Probable jurisdiction was noted and the cases consolidated for argument on October 31, 1983.

Because the Ninth Circuit's judgment invalidated a state statute on federal constitutional grounds, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2).

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* References to the appendix to the HHA's Jurisdictional Statement (*i.e.*, the Appendix To The Jurisdictional Statement in No. 83-141), which was bound in a separate volume accompanying that Jurisdictional Statement, will be cited "A____." References to the separate Appendix to the Jurisdictional Statement submitted to the Court in No. 83-236 will be cited "Portlock A____." References to the Joint Appendix will be cited "JA____."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, is reprinted in full at A109-40. The text of the original 1967 Act, 1967 Haw. Sess. Laws Act 307, is reprinted in relevant part at A141-43. The relevant portions of 1975 legislation related to or amending the Act, 1975 Haw. Sess. Laws Acts 184, 185, and 186, are reprinted at A144-57. The Hawaii Eminent Domain Law, Haw. Rev. Stat. ch. 101, is reprinted in relevant part at A158-78.

STATEMENT OF THE CASE

The issue in this case is whether the United States Constitution freezes our fiftieth state into its feudal past. A central legacy of that past is a system of land ownership concentrated enduringly in the hands of a few. Those few large landowners, retaining a tight grip on the land, have chosen to lease rather than sell it to the many who make their homes there. Similar land monopolies, and the fetters they placed on freeholding, were widely broken in the original United States at the very beginnings of our republic. Whether Hawaii, having entered our union last, may be barred by the intervention of a federal court from freeing *its* land from monopolists' long-term leases—through a Land Reform Act providing for fully and fairly compensated takings—is the question to be decided here.

A. Why The Hawaii Land Reform Act Was Passed.

The Hawaii legislature enacted the Land Reform Act of 1967[1] after years of hearings, testimony, study, and drafting efforts[2]—to remedy the modern social and economic ills

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1 1967 Haw. Sess. Laws Act 307 (findings reprinted at A141-43). (Hereinafter, "Act 307").

2 As noted by the conference committee that reported the bill that became the 1967 Act, "The achievement sought by this bill is not novel. The intent of this bill . . . has been before the legislature for . . . years." Conf. Comm. Rep. No. 19 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 799, 800. Indeed, the barriers posed to widespread residential land ownership by the land monopoly and the leasehold system in Hawaii were a continuing subject of acute legislative concern even before statehood. For instance, a 1955 Territorial Senate resolution called upon the large estates to divest their lands held "for investment and speculative purposes," in order "to release to the people" residential land for fee simple ownership. 1955 Haw. Sen. Reso. No. 49. A 1959 Territorial law, reenacted after statehood as 1961 Haw. Sess. Laws Act 6, provided for state acquisition of private land through eminent domain for residential development. And several bills drafted by the legislature after statehood would have required that long-term leases include options for tenants to purchase their leaseholds, *see* 1963 Haw. House Bill Nos. 24 & 409, but were defeated. The findings underlying each of these acts and bills were substantially similar to those underlying the 1967 Act, which itself followed "[n]umerous hearings . . . by legislative commit-

caused by a land monopoly the legislature viewed as the outmoded vestige of Hawaii's feudal past, "when all the lands in Hawaii were owned by the kings and chiefs and few others to whom the kings and chiefs parceled out parts of the lands."[3] Under that feudal land tenure system, which had origins as early as the first millenium A.D. and which was unified by King Kamehameha I in the eighteenth century, the hierarchy of landlord chiefs oversaw a multitude of tenants, from whom they were able to exact land, labor, and property to an extent denounced as oppressive by King Kamehameha III in his legal code of 1842. In an unsuccessful attempt to cure these ills, King Kamehameha III, in the Great Mahele of 1848, divided all the lands of his kingdom among the crown, the government, the chiefs, and the common people. But the chiefs received much of the land; the commoners, little. And the chiefs' lands, "[o]ver the years, passed into the hands of the small number of present day owners."[4]

This uniquely enduring concentration of land ownership, the legislature found in 1967, had long bred severe economic distortion and widespread social hardship in Hawaii. Demand for single-family houselots was rapidly increasing, especially in the urban areas where population growth and economic development was fastest.[5] But the oligopoly of major landowners, in

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tees at which the representatives of large, private landowners and others interested in the bill testified." Conf. Comm. Rep. No. 19, *supra*, at 800.

3 *Id.*

4 *Id.* As this lawsuit began, the grip of this small oligopoly remained tight. On Oahu, where the State's population is concentrated, three major landowners owned 58.4% of the land privately held on Oahu—nearly 40% of its total area. *See Midkiff v. Amemiya*, Civil No. 47103 (Haw. 1st Cir. June 29, 1978) (Finding of Fact No. 96). Portlock A213. The Bishop Estate alone owned 22.1% of all the privately held land on Oahu—over 15% of its total area. *Id.* (Finding of Fact No. 97). Portlock A213. And as the legislature found in 1975, three-fourths of the island's land area was owned by just 22 major landowners. *See* 1975 Haw. Sess. Laws Act 184 § 1(a). A144.

5 *See* Act 307 § 1(b) & (f). A141 & 142-43. The legislature noted that the rising desire for fee simple ownership of houselots was but part of the "American dream," encouraged heavily by federal legislation designed "to

part because of their pervasive fear of adverse tax consequences, persistently refused to sell their land in fee simple, leasing it instead for residential use under leases typically as long as 55 years.[6] By withholding their land from the supply of land for sale in fee simple, in the face of rapidly growing demand, the landowners had precipitated a critical shortage of fee simple houselots and thus had "artificially inflated" land prices.[7] And the artificially short supply and inflated price of land had effectively forced many thousands of Hawaii residents to lease the land under their homes, depriving them of any realistic choice to live instead on land they could call their own.[8]

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enable the masses to buy that dream." Conf. Comm. Rep. No. 19, *supra* note 2, at 801.

6 *See* Act 307 § 1(e). A142. The landowners' fear of incurring massive tax liability, were they to sell their land voluntarily, was carefully documented by the legislature through extensive committee meetings with the landowners. As summarized by the conference committee, "Sales of residential lots in fee simple in great numbers [as opposed to "casual" or sporadic sales] would cause the gains derived from such sales to be taxed as ordinary income [as to a dealer in real estate in the ordinary course of business]." Conf. Comm. Rep. No. 19, *supra* note 2, at 801. To landowners who had acquired formerly feudal lands at low or zero basis, the tax liability to be feared was great indeed. It was precisely to assuage the landowners' fear of tax liability that the legislature chose *involuntary* sales through condemnation in eminent domain as the means to effectuate the purposes of the Act. *See* pp. 6-7 & n.21 *infra*.

7 *See* Act 307 § 1(g). A143. The legislature noted that because of the large landowners' hesitancy to reap massive tax liability along with profits from sales of their land, the ordinary rule that supply should increase to meet demand, bringing prices down, had simply "failed to operate" in the Hawaii land market. Conf. Comm. Rep. No. 19, *supra* note 2, at 801. Absent significant competition, and given their ability to capture oligopoly profit in their leasehold rental incomes, the landowners had no incentive to put their land on the market for fee simple sales rather than accumulate unrealized artificial appreciation in the value of their holdings. Indeed, were they all instead to enter the fee-simple market, they could have driven down the oligopoly price of land, losing their oligopoly profit forever.

8 *See* Act 307 § 1(f). A142-43. The legislature found a demonstrated, though frustrated, preference among tenants in favor of buying their houselots outright. Conf. Comm. Rep. No. 19, *supra* note 2, at 800-01.

By strangling the supply of houselots for sale in fee simple and so driving residential land prices well beyond the reach of all but a few Hawaii residents, the legislature found, the land monopoly had also contributed to general inflation in the price of consumer goods,[9] and had enabled the large landowners to exact exorbitant rents on leaseholds.[10] Thus Hawaii residents, denied the opportunity to *buy* the land under their homes at reasonable prices, were "strapped to leases which become more and more undesirable as the lease terms run."[11]

In enacting amendments to the Land Reform Act and related legislation in 1975,[12] the legislature expressly reaffirmed the findings on which the 1967 Act had been predicated, explicitly reiterated what it viewed as the highly undesirable social and economic effects of the residential leasehold sys-

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9 *Id.* at 801.

10 *Id.* at 802. Typically, leasehold rents are set at fixed rates for some fixed period at the beginning of the lease term but are renegotiated at the end of that and later periods. The renegotiated rents are generally calculated as a percentage of then current market values. Market values having meanwhile artificially inflated, renegotiated rents often take sudden, violent leaps upward. *See id. See also* 1975 Haw. Sess. Laws Act 184 § 1(d)(4) (A145) (finding rent escalation by as much as 1000%). In general, the legislature found, the landlords' disproportionate bargaining power enabled them to weight lease provisions "heavily in [their own] favor." Conf. Comm. Rep. No. 19, *supra* note 2, at 802. And in the legislature's view, the landowners' "awesome monopolistic advantage should be no less checked [by land reform legislation] than those in industry checked by our federal and state anti-trust laws." *Id.* at 801.

11 *Id.*

12 1975 Haw. Sess. Laws Acts 184 (findings reprinted at A144-46) and 186 (findings reprinted at A152-57) amended the Land Reform Act. (Hereinafter, "Act 184" and "Act 186"). The purpose of these amendments was to facilitate enforcement of the Act—which, from 1967 until then, had not been actively enforced by the State's executive branch—by "mak[ing] more equitable and convenient . . . conversion of residential leasehold lands to fee simple ownership." Conf. Comm. Rep. No. 24 on S.B. No. 1200 (Act 185), 1975 Hawaii Senate Journal 863, 863. 1975 Haw. Sess. Laws Act 185 (findings reprinted at A147-51) set limits on the amount landlords could charge for leasehold rent upon renegotiation.

tem,[13] and noted additionally that the leasehold system threatened to bring about mounting social disruption and public expense.[14]

In short, the legislature passed the Land Reform Act in order to realize four basic purposes by loosening the grip of the leasehold system: *first*, to increase the availability, alienability, and turnover of land for single-family residential acquisition[15];

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13 *See* Act 184 § 1(c) & (d) (A144-45); Act 186 § 2(a)(1)-(6) (A152-54); Act 185 § 1 (A147-51).

14 The leasehold system had so escalated the cost of living in Hawaii, the legislature found, as to threaten the ability of many Hawaii residents to maintain a decent standard of living. Act 186 § 2(a)(6), (7) & (9). A153-55. It thus threatened to cause the state additional public expense to feed and clothe as well as house those residents who could no longer afford to do so themselves. In particular, the legislature found, the elderly residents who had held onto a leasehold for its full term were likely to be, "by reason of age, income, and lack of value remaining in the leasehold, left without means to purchase other housing," and so forced to drop into the already swelling ranks of those needing to be publicly housed. *See* Act 185 § 1 (A150); *see also* Act 184 § 1(e) (A146).

Furthermore, the legislature expressed its fear that the strictures of the leasehold system could cause lawlessness "irreparably rend[ing] the social fabric." Act 186 § 2(a)(7). A154. This was no idle fear. In 1976 and 1977, for example, dissatisfied tenants in Waiahole-Waikane on Oahu who did not qualify for fee purchase under the Act staged a rent strike against the single landowner, blocked highways, burned eviction notices, and refused to leave. *See* "Tenants Won't Budge—Next Move Is Up To . . .?" Honolulu Advertiser, January 4, 1977, at A1, Col. 2, *and* "The 'War' of Waiahole," *id.* at A3, col. 2. The threat of violence was averted only when the State, exercising its general eminent domain powers, condemned the area:

> The Hawaii Housing Authority yesterday paid $6 million in exchange for the deed to 600 acres in Waiahole Valley. Payment of the state housing fund to Elizabeth Marks means that the state is now officially the owner of the Windward Oahu valley where a year ago tenants were carrying on a bitter eviction fight. Earlier this year, Gov. George Ariyoshi announced that the state would buy the land. The decision averted possible confrontation between the tenants and the police over evictions.

"State Now Owns Waiahole Valley," Honolulu Advertiser, December 1, 1977, at A13, col. 1.

15 *See* Act 307 § 1(a) & (j) (A141 & 143); Act 184 § 1(e) (1)-(2) (A146); Act 186 § 2(a)(4), (5), (8), (10), & (12) (A153-56).

second, to spread ownership of fee simple residential lots to as many people as possible[16]; *third*, to disperse the oligopolistic market power of the few large landowners[17]; and *fourth*, to stabilize the State's economy by containing the cost of living as well as the cost of public assistance to the casualties of the leasehold system.[18] These purposes could not be achieved were the land market left to private control by monopolists, the legislature found.[19] And the legislature concluded, as it had to on the record before it, that these were *public* purposes, putting land to *public* use.[20]

B. How The Hawaii Land Reform Act Works.

The mechanism the legislature chose for achieving its purposes was condemnation by the State, under the eminent domain power, of the fee simple title to houselots held under long-term leases, with payment of just compensation by the State for that title. In most cases, the Act envisioned, the State would resell that title to the tenants living on those houselots. Use of the State's condemnation power, rather than its other powers of taxation or regulation, was specifically preferred by the large landowners. Indeed, the legislature had originally drafted the 1967 Act to provide for mandatory options-to-purchase in long-term leases; it redrafted the Act in explicit response to legislative committee hearings—attended by repre-

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16 *See* Act 307 § 1(j) (A143); Act 186 § 2(a)(10), (12) & (13) (A156).

17 *See* Act 307 § 1(c) & (j) (A141-43); Act 184 § 1(d)(5)-(6) (A145), § 1(e)(3)-(4) (A146); Act 185 § 1 (A147-51); Act 186 § 2(a)(1) & (8) (A152-54).

18 *See* Act 184 § 1(e) (A146); Act 185 § 1 (A147-51); Act 186 § 2(a)(6)-(9), (11) (A153-56).

19 For example, the legislature, in discussing the imbalance of bargaining power between the owners of the former royal lands and their tenants, stated: "Inasmuch as the free market cannot correct this situation because of the lack of competition, inherent in an oligopolistic market, it is necessary for the public good and welfare that the imbalance be redressed [through legislation]." Act 185 § 1. A149.

20 *See* Act 307 § 1(j) (A143); Act 186 § 2(a)(10), (12), & (13) (A156).

sentatives of the large landowners, including the Bishop Estate, as well as officials of the Internal Revenue Service—at which it emerged that condemnation would "give maximum [tax] protection to the landowners."[21]

Condemnation under the Act works as follows. Any tenant living on a single-family residential land lot of no more than two acres,[22] within a development tract at least five acres in size,[23] may file an application with the HHA to purchase a fee simple interest in the lot.[24] To be eligible, an applicant must, among other things, own a house on the lot, show proof of ability to pay the HHA for a fee interest in the lot, and not own residential land elsewhere nearby.[25] If eligible applications are filed by the tenants of at least 25 lots or half the lots in the tract (whichever is less), the HHA holds a public hearing, upon public notice, to determine whether acquisition by the state, through condemnation or purchase under threat of condemnation, of fee simple interests in lots in all or part of the tract will "effectuate the public purposes" of the Act.[26]

If the HHA finds that those public purposes would be served, it designates some or all of the lots in the tract for

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21 *See* Special Comm. Rep. No. 2 on S.B. No. 1128 (Act 307), 1967 Hawaii Senate Journal 785, 788-89. Expressly to prevent "the tax status of the landowners [from being] affected adversely," the Senate thus redrafted Bill No. 1128 in the form ultimately enacted as Act 307, providing for condemnation alone. *See* Stand. Comm. Rep. No. 483 on S.B. No. 1128, 1967 Hawaii Senate Journal 1063, 1065. The Act specifies that a conveyance under the Act "shall constitute a compulsory or involuntary conversion," so that the landowner making the conveyance cannot be deemed "to hold the property primarily for sale to customers in the ordinary course of trade or business." Haw. Rev. Stat. § 516-27. A121.

22 Haw. Rev. Stat. § 516-1(11). A112. Chapter 516 is reprinted at A109-40.

23 *Id.* § 516-1(2). A111.

24 *Id.* § 516-22. A118-19.

25 *Id.* § 516-33(3), (4), & (7). A124-25.

26 *Id.* § 516-22. A118-19. The Act's original requirement that the HHA also determine whether there was a shortage of fee simple lots in the surrounding county (unless certain other conditions were present), Act 307 § 11, was deleted in 1976, 1976 Haw. Sess. Laws Act 242 § 2.

acquisition.[27] The HHA then acquires the fee interests in the designated lots, either at the conclusion of condemnation proceedings brought under the Eminent Domain Law,[28] or by settling with the landowner directly.[29] By either method, the HHA acquires on behalf of the state the former fee owners' full "right, title, and interest" in the lots.[30]

Having acquired title, the HHA may sell its interest in a lot within 60 days to a tenant if the tenant has applied, qualified and executed a contract with the HHA to purchase that lot.[31] The HHA may lend such an applicant up to 90% of the purchase price at a reasonable rate of interest,[32] subject to certain restrictions—including that the HHA have the right to repurchase the lot if the borrower decides to resell it within ten years.[33]

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27 The Act was amended in 1975 to permit designation not just of an entire tract but also of portions of a tract. 1975 Haw. Sess. Laws Act 184 § 2(6). *See* Haw. Rev. Stat. § 516-22. A118-19. Nothing in the Act, however, limits designation or condemnation to only those lots on which the petitioning tenants reside.

28 Haw. Rev. Stat. ch. 101. Relevant portions of chapter 101 are reprinted at A158-78. Eminent domain proceedings are brought in the Hawaii circuit courts. *Id.* § 101-10. A163. If the condemnee's answer to the complaint denies that a taking will be for a public use, that issue may be immediately tried to the judge, and an interlocutory appeal from the judge's ruling taken directly to the Hawaii Supreme Court. *Id.* § 101-34. A175. Compensation is determined at a valuation trial with a right to a jury. *Id.* §§ 101-11 (A163); 101-23 (A167-68).

29 In either case, compensation must equal the fair market value of the owner's leased fee interest. *Id.* §§ 516-1(14) (A113-14); 516-24 (A119). The adequacy of compensation is not at issue in this case.

30 *Id.* § 516-25. A120-21. Title passes only after payment. *See id.* § 101-26. A169. The HHA is authorized to finance acquisitions with funds raised by issuance of general obligation bonds or by amounts advanced from general State funds. *Id.* § 516-45. A131.

31 *Id.* § 516-30. A122-23.

32 *Id.* § 516-34. A125-26.

33 *Id.* § 516-35. A126-28.

If the HHA does not sell the fee simple interest in a lot it acquires to a tenant residing there, it may itself lease the lot[34] or sell it to anyone on public notice,[35] subject to a general prohibition against operating for profit,[36] and subject to all other rights provided to tenants by the Act.[37] In any case, the HHA may not sell in fee simple to any one purchaser, or lease to any one tenant, any more than one lot.[38]

C. Contemporaneous State Proceedings Under The Act.

The machinery of the Land Reform Act had been set in motion by the State against various tracts owned by the Bishop Estate long before the Estate filed the federal complaint herein on February 28, 1979, and has continued to operate against those tracts and many others at all times since. Two examples in particular illustrate this continuum.[39]

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34 *Id.* §§ 516-28 ("Where necessary or desirable, the [HHA] may lease the residential lots") (A122); 516-31 ("The [HHA] may lease any of the residential lots in a development tract at such lease rentals and upon such terms and conditions as it may determine") (A123).

35 *Id.* §§ 516-28; 516-29. A122.

36 *Id.* § 516-32. A123-24.

37 *Id.* §§ 516-61 to 516-70 (Rights of Lessees). A132-36.

38 *Id.* § 516-28. A122.

39 Numerous other condemnation actions proceeded throughout this federal action. By November 1979, when the district court heard the first motions for summary judgment in the present case, the HHA had held public hearings on the designation of nearly 7000 of the Estate's lots, and had initiated three condemnation actions against Bishop Estate Wai-Kahala tracts (including Tracts "C" and "H") that were subsequently settled. By April 3, 1980, when the district court heard the remaining motions for summary judgment, the HHA had held public hearings concerning 1500 additional lots of the Estate, and had filed another condemnation action in state court, which was settled after the district court's final judgment of June 10, 1980. Eighteen more condemnation actions had been filed in state court against Bishop Estate lots by the time the appeal below was argued in the Ninth Circuit. As of this filing, there are pending in state court 24 condemnation actions involving over 3500 lots, although all have been enjoined by the post-judgment action of the Ninth Circuit, *see* pp. 13-14 *infra*.

First, the taking of the Bishop Estate's Wai-Kahala Tract "H" had already been found by the HHA to effectuate the public purposes of the Act, and that tract had been designated for acquisition by the HHA on October 20, 1978. That designation followed a public hearing held on April 22, 1977—a full 22 months before the Estate went to federal court. Having chosen not to press its constitutional objections to the Act either in those proceedings before the HHA, in any challenge to the adverse designation itself, or in an action brought before the Hawaii Circuit Court by the affected lessee association to compel arbitration of values for the Tract "H" lots,[40] the Bishop Estate filed its complaint in federal court[41] on the eve of arbitration finally ordered by the HHA under then-existing provisions of the Act.

Second, the Kamiloiki Valley tract, which ultimately became the test vehicle for an extensive state court trial of public use and purpose, had already been the subject of a public hearing before the HHA on February 22, 1979, nearly a week before this federal action was filed. A week before that hearing, the Bishop Estate had submitted to the HHA a written opposition, dated February 13, 1979, in which it charged that Chapter 516 violated the constitutions of Hawaii and of the United States because, among other things, it authorized takings for no public use or purpose. The Estate argued that the HHA should therefore refuse even to designate Kamiloiki Valley or other tracts. The HHA entertained this argument but ultimately rejected it, finding that the acquisition of Kamiloiki Valley would serve the Act's public purposes, and designating it for condemnation on October 17, 1980. Condemnation proceedings, filed in state court November 10, 1980, then moved to the valuation phase, in which the jury rendered a just compensation verdict on November 3, 1982.

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40 *See Wai-Kahala Tract "H" v. Midkiff*, Civ. No. 55837 (Haw. 1st Cir. Nov. 29, 1978), subsequently settled.

41 The Bishop Estate had previously attempted in state court to challenge the constitutionality of Chapter 519—the rent-renegotiation law related to Chapter 516 and based on identical legislative findings. But there, that law was found to serve constitutional public purposes. *Midkiff v. Amemiya*, *supra* note 4. *See* Portlock A232-44 (conclusions of law).

Meanwhile, the first two appeals by major landowning estates challenging takings of their land for lack of public use or purpose had reached the Supreme Court of Hawaii in actions brought under the Act. On November 10, 1982, that court reversed the trial court's partial summary judgments in the State's favor; declined to reach the federal or state constitutional issues it deemed "of first impression," and "of vast public import," without having before it an extensive record concerning "what the legislature had before it when it enacted what is now Chapter 516"; and remanded for further findings on public use and purpose.[42]

The Kamiloiki Valley proceeding was determined to be the appropriate case for that public use trial. After extensive hearings at which voluminous evidence was presented, the state trial court determined that condemnation of Kamiloiki Valley would serve a public use and purpose and that the Act, both on its face and as applied, was fully constitutional.[43] That decision is immediately appealable to the Hawaii Supreme Court. Were it not for the injunction against this and all the numerous other state proceedings under the Act, issued preliminarily by the Ninth Circuit on August 11, 1983, *see* pp. 13-14 *infra*, the Kamiloiki Valley case, begun before this federal action was filed, would therefore doubtless have been the subject of constitutional review in Hawaii's highest court before this federal action is concluded.

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42 *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (1982) (per curiam). *See also Hawaii Housing Authority v. Brown*, No. 8489 (Haw. Nov. 10, 1982). Both decisions are reprinted at Portlock A163-69.

43 *Hawaii Housing Authority v. Midkiff*, Civ. No. 63408 (Haw. 1st Cir. Sept. 6, 1983) (Grieg, J.) (Conclusions of Law Nos. 12-14, 17, 19-23, 26). Judge Grieg's findings of fact, which number over 90 pages, thoroughly review the legislative history of the Land Reform Act, the information on which the legislature based the findings supporting the Act, the leasehold policies of the Bishop Estate, and the course of condemnation proceedings in Kamiloiki Valley. Judge Grieg concluded that under *any* civil evidentiary standard, the Bishop Estate had failed to show that the Act served no public use or purpose. *Id.* (Conclusions of Law Nos. 19-23).

D. The Federal Proceedings Below.

The Bishop Estate filed a complaint against the state defendants in the United States District Court for the District of Hawaii on February 28, 1979. The Estate alleged that the Hawaii Land Reform Act was unconstitutional on its face, among other things because it deprived "the Trustees of their property only for private use, and not for public use, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." JA52.

The state defendants' answer, like the answers (*see* JA76, 80) of lessee associations given leave by the court to intervene (*see* JA67), not only denied that allegation but also objected to any federal judicial intervention before the state's courts had had a chance to provide "authoritative interpretations" of the Act that "may preclude the necessity for a decision of the constitutional issues raised by the Complaint" (JA64).

On the Estate's motion, the district court granted a temporary restraining order suspending proceedings against the Estate under the Act on February 28, 1979. JA58-60. After a hearing on April 24-27, 1979, the district court refused to grant a preliminary injunction against designation or condemnation proceedings.[44] On December 9, 1979, the district court granted partial summary judgment to the defendants and intervenors-defendants, holding the Act constitutional under the public use requirement of the Fifth and Fourteenth Amendments. The district court found the goals of the Act well within the bounds of the State's police power,[45] and the means the legislature chose to serve those goals in no way arbitrary, capricious, or selected in bad faith.[46]

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44 *Midkiff v. Tom*, 471 F. Supp. at 886. A103-04. *See* JA92. The district court did, however, preliminarily—and later permanently—enjoin the use of the mandatory compensation formulas and arbitration-of-compensation procedures then provided for by the Act. *See* JA91-92. Defendants and intervenors-defendants did not appeal this ruling, and the formulas and arbitration provisions have since been repealed by the legislature. 1980 Haw. Sess. Laws Act 107.

45 483 F. Supp. at 67-70. A70-75.

46 483 F. Supp. at 69, 70. A73-74, 75. Final judgment was entered by the district court on June 10, 1980. JA106-08.

On appeal from the district court's judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, in an opinion announced nearly three years after appeal was taken. Relying principally on selected statements by Madison and Hamilton and on the natural law theories of such seventeenth- and eighteenth-century writers as Grotius and de Vattel rather than on any twentieth-century judicial precedent, 702 F.2d at 790-93 (A5-10), the court's opinion, by Judge Alarcon, curtly dismissed years of painstaking legislative investigation and the voluminous findings to which such study led, *see* pp. 1-6 *supra*, as mere "rationalizations" for "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit," 702 F.2d at 798 (A21). Such "appease[ment] [of] the desires of a landless majority to own residential land," *id.* at 793 (A10), the court announced, was "majoritarian tyranny," *id.* at 790 (A5), which inherently violated "the private property rights of the landed minority," *id.* at 798 (A21), and thus transgressed on its face "the public use limitation of the fifth and fourteenth amendments," *id.* (A21).

Joining the court's opinion, Judge Poole also wrote separately to explain why he thought it "manifestly" correct. *Id.* at 799. A21-22. While doubting the Act's efficacy and necessity, *id.* at 804-07 (A32-38), he agreed that its fatal flaw lay simply in its facial operation to "prefer[ ] B's ownership of the land to A's," *id.* at 807 (A38). Whatever social gain might be wrought by effectuating such a preference, he reasoned, only a "Huxleyan advent" so sweeping as to overturn "Magna Carta" could validate even a compensated " 'redistribution' of the property of others." *Id.* A37.

Neither member of the majority thought abstention called for. *Id.* at 789-90 n.1 (A2-4); 799-803 (A22-31). Judge Ferguson, dissenting, concluded "that instead of reaching the merits . . . the majority should have abstained in favor of ongoing state judicial processes," and stated that, in any event, Hawaii's "land reform program . . . does not result in an unlawful taking of property." *Id.* at 819. A63.

Notwithstanding the filing of timely appeals to this Court—by the State on July 15, 1983 (JA166), and by the intervenors shortly thereafter (JA180-81)—the Ninth Circuit, on the

Bishop Estate's motion, recalled its mandate on August 11, 1983, and enjoined all ongoing and future state proceedings against the Estate under the Act, pending issuance of a new mandate. Four months later—after exhaustive briefing, oral argument, two applications by the State to the Circuit Justice for relief from the injunction, and the Justice's suggestion that the Ninth Circuit's post-judgment imposition of an injunction in this case posed "serious" and indeed "close and rather intricate" questions under both the traditional requirements of equity and the principles of comity and federalism set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny[47]—no new mandate has issued.

SUMMARY OF ARGUMENT

Wholly ignoring the elaborate findings of Hawaii's legislature explaining why land reform was a public necessity, the court below announced a wooden and inflexible rule: a state's use of its taking power to transfer land from one group of owners to another is per se invalid as a taking for a private purpose. This is not, and could not be, the law. For this Court—having long ago forbidden federal courts from sitting as superlegislatures to second-guess the wisdom of state socio-economic measures—has repeatedly upheld as rational state laws that, through coercive regulation, enhance the value of the property of one group at the specific expense of another. *See* I.B *infra*. Indeed this Court has long held that such laws *must* be upheld so long as their fulfillment of legitimate public purposes is even "debatable." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

Had Hawaii chosen to deploy the police or taxing powers rather than the taking power to dismantle its residential leasehold system for the sake of ends that are manifestly public and significant, *see* I.A *infra*, there can thus be no serious question that a federal court would have been bound to uphold that exercise of power under a test of minimum rationality. Nor could the fact that such regulation in effect transferred prop-

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47 *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 7, 9 (1983) (Rehnquist, J., in chambers).

erty rights or values between private groups have triggered heightened scrutiny.

No closer scrutiny can properly be applied by a federal court to a state legislative determination that a *taking* will serve a public purpose. "For the power of eminent domain is merely [a] *means*" to an otherwise legitimate public end, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis added), and the principle that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . admits of no exception merely because the power of eminent domain is involved," *id.* at 32.

If anything, state taking legislation coupled with just compensation merits even *less* scrutiny for public purpose than does redistributive state action under the police power or the taxing power. For because the state must back up any determination of public necessity for a *taking* with a promise of full and fair *compensation* for the property taken, taking legislation does not even redistribute aggregate wealth. Accordingly, this Court has held throughout this century that, when a legislature has found that a taking will serve public ends, "[i]ts decision is entitled to deference unless it is shown to involve *an impossibility*." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925) (emphasis added). *See* I.C *infra*.

The Ninth Circuit's application of the strictest scrutiny when all relevant precedent called for the most minimal, and its attempt—in a throwback to an era long since past—to substitute *its* view of the public good for the Hawaii legislature's view, must therefore be reversed. Affirming the ruling below would make this the very first twentieth-century federal judicial invalidation of a state legislature's finding that fully compensated takings in eminent domain will serve a public purpose.

Affirming the judgment below, moreover, would authorize federal judicial intrusion in circumstances where pending state-initiated proceedings against the federal plaintiffs not only afford the latter an ample opportunity to vindicate their federal claims, but also afford state tribunals an opportunity to dispose of or recast the entire case on state grounds, making adjudication of the federal issues presented premature, overbroad, and potentially gratuitous. *See* II *infra*.

ARGUMENT

I. THE NINTH CIRCUIT'S INVALIDATION OF HAWAII'S LAND REFORM ACT USURPED STATE LEGISLATIVE POWER IN A MANNER UNPRECEDENTED IN THIS CENTURY.

A. The Hawaii Land Reform Act Is Classic Socioeconomic Legislation, Designed To Serve Purposes Recognized As Vitally Public From The Very Founding Of Our Republic.

The State of Hawaii's effort in the Land Reform Act to liberate the royal lands of Hawaii's former monarchs for ultimate purchase by the tenantry upon those lands, far from inaugurating the "Huxleyan" Brave New World denounced in the concurring opinion below, 702 F.2d at 807 (A37), simply extends to our fiftieth State the New World of our Constitution's Framers. For the Act not only serves purposes entirely typical and unquestionably public by modern legislative standards, but has roots no less ancient than thirteenth-century England, and fulfills a vision of the free democratic state fundamental to early America's transition from its colonial past.

1. Freeing The Alienability Of Land Over Time.

The Hawaii Land Reform Act was designed to free the alienability and turnover, by those who live on it, of land that would otherwise revert perpetually to a small handful of owners. It thus aims to do nothing more novel than vindicate the age-old Anglo-American common law principle against restraints on alienation—a principle now reflected in the law and public policy of all fifty states. Parliament vindicated that same principle when, in 1290 under the reign of Edward I, it enacted *Quia Emptores*.[48] That statute lifted restrictions barring tenants from granting their land without consent from or payment to their overlord[49]—restrictions that had provoked

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48 18 Edw. I, st. I, cc. 1-3.

49 The restriction on alienation by long-term leaseholders is, if anything, more absolute, for the leaseholder cannot grant his landlot in fee *at all*.

tenants widely to create their own sub-tenancies instead. *Quia Emptores* declared it lawful for tenants to alienate their land freely, so long as their grantees held not from them but directly from the overlord.

The American Revolution, which ultimately freed our forebears from holding land or any other right under any overlord except themselves as a sovereign people, largely put an end to the feudal incidents with which large proprietors had encumbered the land in many of the American colonies.[50] And in

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50 It was quite common in the original colonies for officials of the crown to grant land in vast tracts to proprietors who in turn permitted settler tenants to live on the land—either under explicit long-term leases, or under grants that amounted to long-term leases because the proprietor reserved to himself, quite against the spirit of *Quia Emptores*, perpetual obligations of payment from his tenants in the form of "quit rents." *See* Vance, *The Quest for Tenure in the United States*, 33 Yale L. J. 248, 256-57 (1924). Such feudal restrictions on the freehold were exacted by the Penns in Pennsylvania, the Fairfaxes in Virginia, the Granvilles in North Carolina, the Baltimores in Maryland, and the VanRenssalaers and Livingstons and other "patroons" in New York, to name but a few. These perpetual encumbrances on their landlots were widely loathed by the colonists. *See id.* at 257-58 ("great resentment and public indignation [at quit rents and the levying of distress for their nonpayment] served as one of the principal inducing causes of that state of the public mind that made possible the [American] Revolution"); *see also* B. Bond, *The Quit-Rent System in the American Colonies* 456-60 (1919)("as a token of overlordship and a source of income for absentee proprietaries, the quit-rent was altogether out of keeping with the increasing spirit of individual freedom," *id.* at 459-60).

The Revolution of 1776 led to the widespread abolition of quit rents and other aristocratic vestiges—whether *de facto*, or by statute. Virgina's assembly, for example, summarily abolished quit rents in 1779, declaring "the reservation of royal mines of quitrents and all other reservations" in the grants of formerly royal lands to be "null and void," *see* Act of May 1779, 10 *Hening's Statutes At Large* 64, ch. 13, § 6 (1822); and Connecticut spoke for many states when it declared land to be held "in absolute and direct dominion" by its tenant rather than subject to reservations by any superior lord, *see* Act of 1793, Conn. Rev. Stat., tit. 56, ch. 1, § 1 (1821). Many of the new state constitutions—including those of Massachusetts, New York, New Hampshire, Pennsylvania, and Vermont, like Hawaii's in this century, *see* Haw. Const. Art. I, § 2—enshrined "the right to acquire" property, not just to hold it, as one of the most basic freedoms.

those states in which such feudal incidents persisted, popular legislation hastened their demise by the next century.[51]

The eradication of the restraints on alienation perpetuated by lingering aristocratic landowning patterns, and the various kinds of legislation used to achieve it, were never doubted in America's earliest states to have a fully public purpose[52];

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51 Pennsylvania's experience illustrates both the longevity of a quasi-feudal system of perpetually renewable long-term land leases, and the resourcefulness of a state legislature in seeking to lift that system's restraints—first by taxation, second by divestiture, and third by facilitating adverse possession. In the 1760's, the Pennsylvania colonial assembly attempted to force the Penns to sell off some of the vast tracts they had administered feudally by levying a land tax at a progressive rate. *See* VI B. Franklin, *Papers* 133-34, 162, 196-97, 523-29 (1959 ed.). In 1799, the legislature employed a more direct means: deeming them contrary to the "safety, liberty and happiness" of the people of the state, the Pennsylvania legislature divested the Penn family of all feudal rights, such as to quit rents, furnishing 130,000 pounds compensation. *See* Divesting Act of 1799, 1776-1781 Pa. Acts 258, ch. 139 (1782). As late as 1855, the legislature found it necessary to further enable tenants to throw off their leases, and to acquire freely alienable title to the land they lived on, by declaring all ground rents unpaid and undemanded for 21 years to be extinguished.

In Maryland, where the leasehold system was similarly tenacious, the legislature utilized yet a fourth type of legislation—the regulation of lease terms—to enable tenants to acquire freely alienable title. In 1888, it enacted a statute requiring that any long-term lease give the tenant the right to purchase the fee. (Exactly such a law might have been enacted in Hawaii had the major landowners not preferred condemnation. *See* pp. 8-9 & n.21 *supra*.)

In New York, a vast system of perpetual leases requiring perpetual rent payments to large landowners had survived so vigorously into the nineteeth century that by 1848, the governor estimated that one-tenth of the state's population still lived on manorial leasehold estates. *See* Sutherland, *The Tenantry on the New York Manors*, 41 Corn. L.Q. 620, 624-25 (1956). In the 1840's, escalating violence by tenants who rebelled against paying their manor lords, in "feudal servitude interminable," hens and bushels worth of quit rents, helped to stimulate passage of legislation to tax the landowners' reversionary interests as well as to limit lease lengths and landlords' remedies, in order to discourage the continuation of leaseholds. *See id.* at 631-33.

52 For example, this Court upheld the 1855 Pennsylvania law as a legitimate exercise of the police power for "the general convenience," *Wilson v. Iseminger*, 185 U.S. 55, 60-61 (1902). The Maryland Supreme Court found the Maryland option-to-purchase law a sound exercise of public policy based on "a well-grounded belief that these long leases, with their

Hawaii's more recent effort to eradicate the lingering restraints of a later-lasting feudalism serves no less public a purpose.[53]

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convenants of renewal, were injurious to the prosperity of the City of Baltimore," *Stewart v. Gorter*, 16 A. 644, 645 (Md. 1889). And although the New York anti-leasehold laws were never judicially interpreted to be legitimately public in purpose, Governor Seward refuted any suggestion to the contrary when he wrote, in his 1840 message to the legislature, that leasehold tenures, "introduced before the Revolution, are regarded as inconsistent with existing institutions, and have become odious to those who hold under them. They are unfavorable to agricultural improvement, inconsistent with the prosperity of the districts where they exist, and opposed to sound policy and the genius of our institutions." III Lincoln, *Messages from the Governors* 776 (1840), *quoted in* Sutherland, *supra* note 51, at 630.

53 Nor can any argument be made that public purpose is extinguished when restrictions on alienability are reduced by reallocating the bundle of property rights in a parcel of land, as Hawaii's law might be said to do despite its provision for just compensation. For the police power has long been viewed as fully embracing the power to redefine property rights *without* compensation where the legislature finds a particular public necessity. As this Court stated in *Wilson v. Iseminger*, a state may promote the general convenience not only through such obvious devices as safety laws, but also through laws that redefine property rights: " 'estates held in joint tenancy and in common may [under a state's "police power"] be divided among the tenants, even by conversion and sale; life estates may be separated from each other; qualified inheritances expanded into absolute fee; and contingent and executory interests extinguished.' " 185 U.S. at 61. This Court has likewise upheld adverse possession laws despite its acknowledgement that they "indirectly . . . effect a complete divestiture and tranfer of right." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Peters) 456, 467 (1831). And as Samuel Tilden stated in his 1846 report on "The Anti-Rent Disorders" in New York, alterations in the laws governing the descent of property so as to remedy "the principal evil" of "[a]n excessive suspension of the power to alienate lands, which restrained any one man from having their complete control, and prevented the full development of their resources," had never been viewed as beyond the power of the legislature—notwithstanding the fact that such legal alterations "unsettled the disposition of a vast . . . amount of property." I S. Tilden, *Writings and Speeches* 215 (1885).

In any case, sheer reallocation of the bundle of property rights to particular lands in order to redress some public injury has a venerable history: the great Statute of Uses, enacted by Parliament in 1536 under Henry VIII, curbed two mischiefs of the "use" system—the non-registry of title to land, and the evasion of feudal incidents owed to the King and other lords, by those who conveyed uses to their lands—by simply conferring full legal ownership of land on those who had held mere uses in that land.

2. Broadening Opportunities For Land Ownership.

The Hawaii Land Reform Act was designed not only to enable any particular land parcel to be more freely transferred *vertically* from landowner to landowner over time—rather than be trapped perpetually in the hands of a single landowner—but was designed also to spread land ownership *horizontally* by enabling more Hawaii residents to acquire the land on which they live. It thus aims to do nothing more novel than fulfill the promise America held out long ago to its settlers—the promise that the many need not go landless in order that a few might rule the land. As John Adams wrote,

> The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of land into small quantities, so that the multitude may be possessed of landed estates.

IX J. Adams, *Works* 376-77 (1856 ed.).[54] Indeed, the maximum dispersion of opportunities to own one's own land and home has since been the aspiration of much American policy.

To give but a few examples, the Homestead Act of 1862[55] reflected a strong federal policy in favor of broadly disaggregated land ownership and against absentee aggregation of landholdings for speculative purposes. The Act required that an applicant intend to use the land for "settlement and cultivation," and rigidly limited the amount of land a single applicant could receive[56]—a limit maintained until the homestead law's repeal in 1976.

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54 In a nation that at its outset permitted only freeholders to hold office and to vote, such a view is not surprising. Freeholding, furthermore, was widely viewed in the early days of the republic as as powerful incentive to economic productivity; as Samuel Tilden observed in decrying leasehold tenure, "[t]he mere idea of proprietorship is a valuable element of the . . . social character. . . . [T]he inclination to make improvements is impaired if the sense of ownership is not complete." Tilden, *supra* note 53, at 196-97.

55 12 Stat. ch. 75, 392 (1862).

56 *Id.* §§ 2 & 6.

Likewise, a complex of more modern federal programs reflects a strong federal policy in favor of broadly dispersed access to home ownership. The widest possible distribution of the American dream is the ultimate goal behind, for instance, mortgage financing through the Federal Home Loan Bank System and the Federal National Mortgage Association, mortgage insurance subsidized by the Federal Housing Administration, favorable tax treatment for home ownership under the Internal Revenue Code, and construction of various forms of public housing. No such federal program has been successfully challenged as insufficiently public in purpose; nor can our fiftieth state's effort to extend the American dream to its people be so condemned.

3. Breaking Up Oligopolistic Control.

As the flip side of multiplying opportunities for land ownership, the Act is designed to disperse the extraordinarily concentrated market power of a small oligopoly of landowners in Hawaii, and to increase the bargaining power of tenants in relation to those landowners. It thus aims to do nothing more novel than combat one of the very phenomena the Founders most feared and hoped most to prevent from arising in the New World as in the Old: namely, land monopoly. The fear that excessive concentration of land ownership would strangle the supply of land, and so drive up its price, characterized even some pre-Revolutionary thought.[57] And the need to forestall

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57 This fear was expressed, for example, by Joseph Morgan, a Bostonian Congregational minister, in a 1722 pamphlet entitled *The Original Rights of Mankind*. In keeping with prevalent Puritan thought, Morgan decried landholdings in excess of "need and use," and advocated a tax on dormant land to force land speculators to disgorge their holdings.

Other colonists stressed less the immoral than the uneconomic effect of land monopoly. New York's surveyor-general and lieutenant-governor Cadwallader Colden, for example, complained that in the face of the artificial shortage of land caused by land monopoly in New York, "every year the Young people go from this Province and Purchase Land in the Neighbouring Colonies, while much better and every way more convenient Lands lie useless. . . ." Report of Cadwallader Colden 1 *Documentary History of the State of New York* 377, 384 (1849).

While New York colonists might readily have avoided a life of tenantry by traveling but a few miles to Connecticut or Vermont, choosing such an

land monopoly in the United States was viewed as pivotal to the new republic by framers like Jefferson.[58]

In the modern era, breaking up concentrated economic power so as to enhance competition, efficiency, and the functioning of the market is the central public mission of the antitrust laws. States, like the federal government, are clearly empowered to order monopolists or oligopolists to divest their property. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 & n.13 (1978).

Not since such decisions as *Coppage v. Kansas*, 236 U.S. 1 (1915), which suggested that inequalities of bargaining power are "but the normal and inevitable result" of liberty of contract, *id.* at 17-18—decisions thoroughly repudiated by this Court for the last half-century[59]—has it been doubted that regulation tending to offset the unequal bargaining power of employer and employee, or of landlord and tenant, *see, e.g. Block v. Hirsh*, 256 U.S. 135 (1921), is well within ordinary legislative authority. Nor is that authority in any way diminished merely because such regulation may disappoint the ex-

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alternative is far more costly to Hawaii residents. For Hawaii residents to journey to any other state, they must cross 2500 miles of water. *Cf. Olim v. Wakinekona*, 103 S. Ct. 1741, 1746 (1983) (upholding federal prisoner transfer).

58 Having observed, as Ambassador to France, the crisis of a landless peasantry deprived of work on large landowners' vast estates—estates he viewed as in excess of natural justice—Jefferson believed it critical to prevent the rise of any such land monopolies in the United States of America. In some of his writings, he advocated a geometrically progressive tax on landholdings as a preventive measure. *See* I T. Jefferson, *Papers* 358-63, 484, 560; II *id.* 139-40 (1950 ed.); *see generally* W. Scott, *In Pursuit of Happiness* 42-43 (1977). In opening up the western lands, some members of the early Congress believed it crucial to avoid land aggregation by speculators in favor of disaggregated ownership and use by settlers. *See, e.g.* 3 E. Channing, *A History of the United States* 535-38 (1920).

59 It is not clear that the court below took any notice of the demise of *Coppage*, however, for the majority opinion—in a passage reminiscent of that case and devoid of any modern authority—cites Madison's statement, " 'In all civilized societies, distinctions [of property] are various and *unavoidable*,' " as authority for its invalidation of Hawaii's law. *See* 702 F.2d at 791 (emphasis added). A7.

pectations built up by the disproportionate market power previously enjoyed by the landlord; many indisputably public rent-control, condominium-conversion, and mandatory option-to-purchase ordinances do just that.

4. Facilitating Public Tranquility And Welfare.

In addition to reforming the residential land market, the Act is designed to serve a variety of other purposes important to the general public welfare of the state—to the "moral, social, economic, and physical well-being of the community," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952), as well as to its "spiritual" and "aesthetic" values, *Berman v. Parker*, 348 U.S. at 33. It is designed—like much fiscal and monetary policy—to stabilize the cost of living by curbing land prices and rents. It is designed to prevent families from having to watch as their lifelong homes are razed by the bulldozers of landlords with more profitable uses of the land in mind. It is designed to avoid social disruption and disobedience to law inspired by the harsh strictures of a residential leasehold system—in Hawaii, *see* note 14 *supra*, no less than in New York over a century ago, *see* note 51 *supra*. It is designed to reduce social expenditures needed by casualties of the residential leasehold system, such as the elderly who, no longer able to afford to lease, must enter public housing. And it is designed to give Hawaii residents the opportunity to acquire and enjoy full equity in their homes and homesites, to pass on to their children[60] or to sell as they please—an opportunity that might well keep some from abandoning the state in desperation, or inspire others to build more enduring residences, secure in the knowledge that the land on which they have made their homes cannot be pulled out from under them at the end of decades-long leases.[61]

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60 New York's lieutenant-governor Colden noted that quit rents were intolerable to Americans because they had left the Old World precisely "to avoid the dependence on landlords [suffered by "Vassals and Tenants"], and to enjoy lands in fee to descend to their posterity that their children may reap the benefit of their Labour and Industry." Colden Report, *supra* note 57, at 384.

61 The universal human wish to avoid such harsh uprooting was perhaps best described by Justice Holmes, who wrote in a letter to Henry

"The concept of the public welfare is broad and inclusive," *Berman v. Parker*, 348 U.S. at 33; each of these purposes of the Hawaii Land Reform Act falls well within its bounds. And the *combination* of these purposes yields not merely a rational, but a compelling, justification for the Act.

B. Neither The Economic Benefit Conferred On One Group, Nor The Economic Harm Inflicted On Another, Can Invalidate Regulations A Legislature Could Rationally Have Believed Would Advance Such Public Purposes.

1. The Governing Standard Is One of Minimum Rationality.

The court below not only wholly ignored the manifold purposes underlying the Hawaii Land Reform Act, but also wholly ignored the federal constitutional standard by which all state socioeconomic legislation is to be judged. Those challenging socioeconomic legislation—whether on substantive due process or on equal protection grounds—must show "that the legislative facts on which [a law] is apparently based could not reasonably be conceived to be true by the [legislature]." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). So long as "the question is at least debatable," *United States v. Carolene Products Co.*, 304 U.S. at 154, those who attack economic legislation as not reasonably calculated to advance legitimate state goals "cannot prevail," *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 470 n.12 (1981).[62] Disregarding this standard, the

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James that he favored the acquisition of title by prescription because "man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life." Letter from O.W. Holmes to Henry James, Apr. 1, 1907, *reprinted in* M. Lerner, *The Mind And Faith Of Justice Holmes* 417 (1943).

62 *Accord, United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176-78 & n.10 (1980); *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 124-25; *New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam); *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. at 425 (Court's "recent cases . . . leave debatable issues as respects business, economic, and social affairs to legislative decision"). Furthermore, contrary to the implications of the concurring opinion below, *see* 702 F.2d at 804-806

court stated only its view that public transfers of property from one set of private parties to another are p[illegible]se invalid as serving a private purpose, notwithstanding payment of full compensation, and no matter how broad the economic and social benefit they bring about. *See* 702 F.2d at 798 (A21); *id.* at 806(A36). But that is not the law, as the following analysis makes clear.

2. Regulatory Redistributions Of Economic Advantage Trigger No Heightened Scrutiny of Socioeconomic Legislation.

Even uncompensated redistribution of economic advantage through regulation is not invalidated, nor even subjected to higher than minimal scrutiny, merely because it imposes economic costs on, or denies economic opportunities to, "A" in order that "B" may gain. Indeed, virtually all of the very cases that reiterate the minimum rationality standard involved state regulations that destroyed or impaired one set of investment-backed property interests in order to protect or enhance another that the legislature deemed it in the public interest to prefer.

In *Miller v. Schoene*, 276 U.S. 272 (1928), the economic benefit conferred on apple owners at the direct expense of cedar owners did not invalidate a state regulation requiring the uncompensated destruction of infected cedar trees in order to save nearby apple trees. Instead, Justice Stone wrote for a unanimous Court that

> [i]t will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of

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(Poole, J.) (A32-36), it is clear that "whether *in fact* the provision will accomplish its objectives is not the question: the [Fourteenth Amendment] is satisfied if . . . the . . . [state] legislature rationally *could* have believed that . . . [it] would. . . ." *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466; *Vance v. Bradley*, 440 U.S. at 112. Since the ability of the Hawaii Legislature rationally to believe that the Land Reform Act would achieve its public purposes is beyond question, no factual evidence the Act's challengers might have adduced would have sufficed to overturn the Act.

> apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other.

Id. at 279.

Regulation has similarly been upheld on a minimum-rationality standard against Fifth and Fourteenth Amendment challenge notwithstanding the fact that it conferred a distinct economic advantage on, for example, truck owners advertising only their own wares at the expense of those seeking to advertise the wares of others,[63] on eye doctors at the expense of opticians,[64] on lawyers at the expense of debt adjusters,[65] on established pushcart food vendors at the expense of "vendors of more recent vintage,"[66] on retail car franchisees at the expense of automobile manufacturers seeking to open competing franchises,[67] on railroad workers connected with the in-

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63 *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a city ordinance forbidding advertising on trucks except by the truck owner of his own goods or services, on the ground that local authorities may well have concluded that the latter posed less risk of distraction to traffic).

64 *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (upholding a state statute forbidding an optician from fitting or duplicating lenses without a prescription from an opthamologist or optometrist, on the ground that the legislature might have concluded that a prescription was necessary often enough to require one in every case).

65 *See Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (upholding a state statute forbidding debt adjusting except by those authorized to practice law, on the ground that the legislature could have concluded that the business of debt adjusting lacked social utility).

66 *See New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (per curiam) (upholding a city ordinance banning from the historic Vieuex Carre all vendors except two who had operated there for over eight years, on the ground that the city could reasonably decide that the two exempted vendors had greater reliance interests or had themselves become part of the charm of the district).

67 *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding a state statute permitting existing franchisees

dustry as of 1974 at the expense of those with similar experience lacking so recent a connection,[68] and on the paperboard industry at the expense of the plastic container industry.[69] In short, this Court has long since decisively rejected the losing argument made before it by the cedar owners in *Miller v. Schoene*:

> We submit that there is not, in the American theory of government, any room for the view that one man's property may be taken or destroyed, either directly by eminent domain or indirectly, under the guise of taxation, or of the police power, in order to enhance the property values or the financial prosperity of another.

276 U.S. at 275 (argument of counsel).

That argument has unequivocally been rejected, in fact, in the precise context of laws eliminating certain property rights of landlords in order to expand the rights of their tenants. Such laws recognize that "what in its immediate aspect may be only a private transaction may . . . be raised by its class or character to a public affair," *Block v. Hirsh*, 256 U.S. 135, 155 (1921). Holding that, where land is "monopolized in comparatively few hands," *id.* at 156, government may by law transfer control to tenants over the reversionary interests that landlords

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to trigger administrative review of prospective manufacturer dealerships, on the ground that the legislature was "empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices," *id.* at 107, or to redress "disparity in economic power" between the two, *id.* at 111 (Marshall, J., concurring)).

68 *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177-78 (1980) (upholding an Act of Congress eliminating dual retirement benefits for workers without a 1974-or-later connection with the industry, on the ground that Congress could have concluded that such funds ought to be used first for those more recently working as railroaders).

69 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 466 (upholding state ban on the sale of milk in nonrefillable plastic but not in nonrefillable paperboard containers, on the ground that the legislature could rationally have concluded that such a ban might have environmentally desirable effects).

had retained through pre-existing leases, the Court in *Block v. Hirsh* not only gave "great respect" to the legislature's "declaration . . . concerning public conditions that by necessity and duty it must know," *id.* at 154, but even permitted the "property rights" at issue to "be cut down, and to that extent taken, without pay," *id.* at 155.

Although dispute persists over the circumstances in which government may effect such an *uncompensated* "transfer of control over the [landlord's] reversionary interest," *Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S. Ct. 218, 220 (1983) (Rehnquist, J., dissenting from dismissal of appeal for want of substantial federal question); *cf. id.* at 218 (majority evidently extended *Block v. Hirsh* beyond temporary emergency measures), the Court now seems unanimous in upholding the underlying substantive power to transfer the property rights at issue. No echo can be heard in this Court's contemporary cases of the cry of Justice McKenna, joined by Chief Justice White and Justices Van Devanter and McReynolds in dissenting from *Block v. Hirsh*, that such transfers reek of "socialism," 256 U.S. at 162, and manifest "tyranny and injustice," *id.* at 163, insofar as they "annul the covenants of a contract between two . . . citizens . . . to transfer . . . the property of one and vest [it] in the other," *id.* at 164.

It follows that, had Hawaii's legislature chosen to attack the residential leasehold system by means of simple regulation—for example by imposing, as it considered doing and as Maryland did long ago, a mandatory option-to-purchase requirement on all long-term leases—the proposition that the landowners lost economic advantage in order that the tenants might gain would not invalidate the law, particularly given the built-in compensation that would occur when each option was exercised. If the landowners might thus have lost one "political battle," they could have been expected to win others in the ordinary give-and-take of the "legislative forum," *see United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980).[70] As Justice White wrote for the Court in *Vance v.*

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70 Indeed, the very fact that Bishop Estate lobbied, for federal tax reasons, against the Maryland law in favor of the condemnation law that was ultimately enacted, *see* notes 6 & 21 *supra*, demonstrates that its voice was heard —and heeded—in the state's legislative process.

Bradley, "The Constitution presumes that, absent some reason to infer antipathy, ... decisions [if "improvident"] will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 440 U.S. at 97. To apply strict scrutiny to such a regulation would be to treat as a discrete and insular minority a class distinguished only by its wealth in Hawaii landholdings.[71]

3. Even Regulations That Transfer Private Property Interests In Land So Sharply As To Be Deemed "Takings" Trigger At Most A Requirement Of Just Compensation.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412-13 (1922), this Court held that a state ban on subsurface coal mining that threatens surface housing not owned by the coal company—as applied to parties whose predecessors in title had earlier contracted between themselves, for valuable consideration, to permit precisely such mining—in effect *took* subsurface property previously retained by the coal companies, and conferred that property upon those to whom the coal companies had previously sold only the surface rights. But all that followed from the Court's recognition of private benefit in that transfer[72] was that the state could not achieve its aims "by a shorter cut than the constitutional way of paying for the change," *id.* at 416—*not*, as the theory of the court below would require, that the state could not transfer defendants' property to the plaintiffs *at all*, even upon payment of fair compensation. In short, the fact that the challenged regulation worked a property transfer from the coal company to the surface dweller—from "A" to "B"—in no way prevented the Court from "*assum[ing]* . . . an exigency exists that would warrant the exercise of eminent domain," *id.* That *compensation* might be required in no way requires closer scrutiny of *public purpose*.

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71 The Ninth Circuit seems to have done just that. *See* 702 F.2d 798 (need to protect "the landed minority"). A21.

72 The Court in *Mahon* recognized that it was dealing with "the case of a single private house," *id.* 413, and that the law at issue could not be "justified as a protection of personal safety," *id.* 414. Nor was there a claim in that case, as there had been in *Block v. Hirsh*, of a housing shortage that might warrant an uncompensated transfer of property rights.

C. Whether A State's Overt Exercise Of The Taking Power To Transfer Property Interests Between Private Groups Serves A Public Purpose Is Likewise Reviewable By A Federal Court Only For Minimum Rationality.

1. Judicial Deference In Such Cases Is Mandated By Logic And Precedent Alike.

It would make no sense whatsoever to hold that *eminent domain*, even with just compensation, may sometimes be barred for want of public purpose where an *economic regulation* having the same overall aims and effects, and similarly operating by transferring property interests between private groups, would routinely be upheld—without searching scrutiny of public purpose, and with no more than, at most, a requirement of just compensation. For any such holding would perversely press the state into achieving by unscrutinized regulatory action, perhaps even without compensation, what federal judges could prevent the state from accomplishing by compensated exercises of eminent domain. The upshot would be *less* protection for the private interests adversely affected, and reduced flexibility for the state—a clear loss to all concerned. Happily, that is not the law.

On the contrary, the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking—either automatically, or even presumptively—as having only a private purpose. The controlling precedent is *Berman v. Parker*, 348 U.S. 26 (1954), in which the Court held that, as in the case of all socioeconomic legislation, "[t]he role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one," *id.* at 32. That decision, by a unanimous Court, upheld a taking of a department store's land for transfer to a private housing developer. Flatly rejecting the argument "that this makes the project a taking from one businessman for the benefit of another businessman," Justice Douglas wrote that, once the public purpose of the taking is established, the use of the taking power is just another means to that end, and any decision such as whether to transfer the property to a private or a public redeveloper is for the legislature alone to resolve. *Id.* at 33-34.

Long before *Berman v. Parker*, moreover, this Court had laid to rest any notion that literal "use by the general public" was a prerequisite to a finding of public purpose in a taking of private property, and had upheld numerous takings whose immediate beneficiaries were one or more private individuals—individuals who sometimes initiated the takings and furnished the requisite compensation.[73] In all such cases, the Court has recognized that "the very foundations of public welfare" may demand "concessions from individuals to each other" that cannot always "be left wholly to voluntary consent." *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 531 (1906).[74]

The standard of review evolved in these cases, and in cases involving the federal taking power, its one of "well-nigh conclusive" deference, *Berman*, 348 U.S. at 32, to any legislative determination that a taking will serve a public purpose, so long as that determination is not so manifestly irrational as to involve "an impossibility," *Old Dominion Co. v. United States*,

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73 Thus, in *Rindge Co. v. Los Angeles*, 262 U.S. 700, 706-07 (1923), the Court held that the taking of ranch property for a road usable by various neighbors for "marketing produce" and other similar business or recreational private activities was sufficiently "public" in purpose, even though neither the "entire community, nor even any considerable portion, [would] directly enjoy or participate in [the] improvement." And in *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527, 530-31 (1906), the Court upheld the taking of a right of way, in a condemnation proceeding begun by a private company pursuant to state law, for an aerial tramway across private property in order to facilitate the company's commercial exploitation of mineral resources, upon payment into court by the company of the fair value of the right of way thereby condemned. Similarly, in *Clark v. Nash*, 198 U.S. 361 (1905), the Court upheld the condemnation by an individual of an easement across another's land for the irrigation of the individual's property, pursuant to a state law permitting such condemnation. *See also Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161-62 (1896) (condemnation by irrigation districts); *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 22 (1885) (upholding state Mill Act authorizing riparian owners to erect and maintain mills provided they compensate upstream landowners for resulting flooding).

74 *See also People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316, 323 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946); *Government of Guam v. Moylan*, 407 F.2d 567, 568 (9th Cir. 1969). *See generally* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

269 U.S. at 66; *see United States ex rel. TVA v. Welch*, 327 U.S. 546, 552 (1946).[75]

2. Such Deference Is Required Whether Or Not The Divestiture Of Property Effects Concrete Changes In Use Or Possession.

The court below, utterly disregarding this established standard, stated that, except for certain "historically accepted" situations supposedly fixed for all time by stare decisis, *see* 702 F.2d at 794, 795-96 (A12, A14-16),[76] such deference need apply only when takings effect concrete changes in the use or possession of the land taken, *id.* at 794-95 (A13-14).

This mechanical view, however, has no basis whatever in the case law, and indeed blindly ignores the fact that, in some circumstances, it is only compensated reallocation of ownership in land that can effect the public benefit sought. Divestiture of an oligopolist's property, for example, need change neither use nor possession; it is by breaking up concentrated *ownership* that such antitrust measures achieve their competition-enhancing aims. The Statute of Uses similarly changed neither use nor possession, but merely rearranged the bundle of legal rights to each parcel of land it affected. *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946), likewise upheld a land redistribution program that, among other measures, created homestead rights in those squatting on the land. *See id.* at 319, 325. And in perhaps the most analogous setting of all, the

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75 These two decisions reviewed takings authorized by Congress. It is clear, however, that at least as much deference must be paid to state legislatures, in light of the well-settled principle that "a local legislature, because of its intimate knowledge of local conditions, has great latitude in determining what uses of land are conducive to community prosperity" and the general welfare. *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d at 324. This means that factual disputes in this sphere are solely for the legislature to resolve, with *no* second-guessing at all by a federal court so long as the matters at issue are at least debatable, as they certainly are here.

76 It is ironic how quickly the court below, having stressed the importance of judicial oversight of public use, abdicated that self-proclaimed responsibility by reducing the eminent domain precedents to a rigid set of categories immune to historical evolution.

Maryland Supreme Court rejected the argument that lessees' options to purchase their leased land—options that, if exercised, change ownership, not use or possession—per se confer only private benefit: "it was the *system* of these long leases, irredeemable until the end of the term, that the legislature wished to break up, *rather than any special consideration for the lessees*, that caused the [Maryland] act," *Stewart v. Gorter*, 16 A. at 645 (emphasis added).

3. In Any Event, Hawaii's Land Reform Act Works No Mere Private Transfer That Leaves Land Use Unchanged.

Only the most short-sighted could view the Hawaii Land Reform Act as merely shifting title from "A" to "B" without changing the use of land in Hawaii. Even the court below, after all, did not deny that the Act shifts land out of *investment* use for the speculative purposes of a few absentee owners of large development tracts into *residential* use for the personal purposes of many occupants of small lots. *See* 702 F.2d at 796-97 (A17). The Act safeguards against speculation and encourages residential use: it authorizes no condemnation on behalf of occupants who own residential land elsewhere nearby, *see* p. 7 & n.25 *supra*; the HHA may not sell to any one purchaser, or lease to any one lessee, any more than one condemned lot, *see* p. 9 & n.38 *supra*; the HHA may repurchase any lot if one to whom it has lent the purchase price decides to resell it within ten years, *see* p. 8 & n.33 *supra*; and the HHA may retain title to the lots it condemns, leasing instead of selling individual homesites, *see* p. 9 & n.34 *supra*.

Moreover, viewed from a long-term perspective and in macrocosm, the shift in use occasioned by the Act will likely make an enormous difference to Hawaii's overall pattern of land development. Land distributed in small parcels among many owners is unlikely, for example, to be pooled for large investment projects such as a single large landowner might wish to construct.[77]

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77 The Bishop Estate has itself been withholding from sale to current leaseholders certain beachfront properties for which "it apparently wants to keep open such future options as resort development." The Honolulu Advertiser, July 20, 1983, at A-3, col. 2.

4. The Hawaii Land Reform Act Has None Of The Special Features That Might Make Even A Fairly Compensated Taking Constitutionally Suspect.

There is no federal precedent for subjecting any particular *category* of takings, regardless of just compensation and public purpose, to special judicial scrutiny (including a demand for a compelling state interest and a search for less drastic means) of the sort this Court has applied in certain "civil liberties" cases since the 1960's.[78] To be sure, all private property is a specifically protected constitutional right. But the unique protection it receives under the Constitution is that it cannot be taken without just compensation—a requirement inapplicable when personal liberty is cut back, and in that sense "taken," by a socioeconomic measure.

If this Court should ever decide that the Constitution's promise of just compensation insufficiently protects some particular category of property, or some particular subset of property takings for a public purpose, such a decision could surely occur only in a context where no amount of money could "compensate" for the special harm government was doing—where government was expropriating not an impersonal and fungible economic investment, but a person's home or place of worship or center of political association, so as to effect some combination of dispossession, desecration, or disenfranchisement in addition to a taking of compensable wealth.[79]

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78 *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960) (freedom of political association); *Sherbert v. Verner*, 374 U.S. 398 (1967) (free exercise of religion); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (freedom of interstate travel); *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate pregnancy).

79 Such a case might be one in which many are uprooted from their dwellings and dispersed as a cohesive political community at the behest of a major corporation or other politically powerful combination. *See, e.g., Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation of an ethnic residential neighborhood to make way for a General Motors plant that would allegedly provide more jobs for the state's people). *See id.* at 474 (Ryan, J., dissenting) (advocating closer scrutiny because this taking forced people from their "lifelong home and community"); *id.* 468-70 (Ryan, J., dissenting) (advocating closer scrutiny in light of single corporate beneficiary identifiable in advance); *id.* at 463-64

It would be worse than ironic for the eminent domain power—so widely used in the last century to permit private corporations to force small landowners from their homes for the sake of economic development, typically with little or no actual compensation, and with few meaningful procedural checks, *see, e.g.*, Scheiber, *Property Law, Expropriation, And Resource Allocation By Government: the United States, 1789-1910*, 33 J. Econ. Hist. 232, 237-43 (1973)—to be held unconstitutional in this century where used to protect people from forcible exile from their homes, a use more consistent with the aspirations of our Constitution's Framers. Far from *dispossessing* anyone, the Act enhances the domestic security of the families and children who live on the land by giving them an opportunity to own it, while fully preserving, through just compensation, the interest of those for whose benefit the land is currently held as an investment. And the Act, far from *aggregating* political power in the hands of a favored and identifiable few by stripping the many of the property in which their political identity and influence are rooted, democratizes whatever political clout the ownership of land in Hawaii confers.

* * *

It follows that the Ninth Circuit's facial invalidation of the Land Reform Act was as unwarranted as it was unprecedented—an unjustifiable blow both to the legitimate land-use aspirations of Hawaii's people, aspirations the state legislature aptly described as the "American dream," and to the sovereign lawmaking authority of their elected legislative representatives.

(Fitzgerald, J., dissenting) (same). *See also*, R. Caro, *The Power Broker* 850-94 (1974) (taking of land for Cross-Bronx Expressway obliterated thousands of homes in an Eastern European Jewish community, rather than take the land of their politically more powerful neighbors).

II. IF APPELLEES' CONSTITUTIONAL CHALLENGE IS AT ALL COLORABLE, THEN THE COURTS BELOW VIOLATED PRINCIPLES OF FEDERALISM AND COMITY IN FAILING TO ABSTAIN OR DISMISS.

This Court has long recognized that proper regard for the respective roles of federal and state tribunals in resolving constitutional attacks on state laws warrants strict adherence to principles of abstention, *see, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), including federal dismissal to permit already pending state proceedings to continue without needless interruption, *see, e.g., Younger v. Harris*, 401 U.S. 37 (1971). The costs of overbroad, premature, or altogether avoidable federal interference with the enforcement of state laws are potentially enormous. At stake are both this Court's legitimacy as final arbiter of the Constitution's meaning and the viability of state sovereignty in the federal system. The values served by abstention or dismissal are especially important where, as in this case, the constitutional challenge is one directed against the state's exercise of its eminent domain power—a power "intimately involved with sovereign prerogative," *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959), and where, as here, federal intervention threatens to disrupt ongoing state proceedings in which questions of "first impression," *Hawaii Housing Authority v. Castle*, 653 P.2d 781, 782-83 (Haw. 1982) (Portlock A166), concerning the basic scope and validity of that state law are being determined. The failure of the courts below to abstain or dismiss breaches these fundamental principles.

At the outset, we note two possible reasons for nonetheless overlooking that breach in this case. *First*, if the preceding argument, *see* I *supra*, persuades the Court that appellees' constitutional claims against Hawaii's Land Reform Act are "utterly without substance," then perhaps the district court's prompt exercise of jurisdiction, under the circumstances of this case, best advanced the fair and efficient administration of justice without usurping any state function. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. at 34 (Brennan, J., dissenting). Were this Court to agree with that

assessment of the merits, it might follow that the district court acted defensibly in summarily rejecting appellees' claims on the merits, pausing neither to dismiss nor even to abstain.[80]

Second, whether or not the district court erred in reaching the merits, requiring abstention or dismissal at this late stage simply may not be worth the costs of continued litigation and uncertainty over the law's facial validity—if the Court is prepared to sustain the law on the present record as the State urges. To be sure, the value of correcting the lower courts' abstention errors—both for this case and for the guidance of other courts in the future—is considerable. But the disadvantages of such a course are manifest as well, particularly now that the State of Hawaii has been acting under a cloud of doubt for nearly five years of federal litigation. To prolong that period would consume still further public and private resources, only to reach a conclusion this Court might well be prepared to decree without such costly delay: validation of the Land Reform Act on its face so far as federal law is concerned. Indeed, to the extent protracting this litigation restricts the pace and possibility of enforcing the Land Reform Act, it will enable appellees, seeking to extract their oligopoly price before it is too late, to subvert the purposes of the Act by selling their land to wealthy third parties before the land can be designated or condemned. If costs such as these are thought to outweigh the advantages of directing abstention or dismissal at this point, and if this were the Court's stated reason for proceeding to the merits and upholding the law, this Court would nonetheless retain the benefits of instructing lower federal courts on their duty to abstain or dismiss at the outset in similar situations.[81]

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80 Of course, no such justification could be offered for the Ninth Circuit's refusal to abstain. For, far from regarding appellees' claims as frivolous, the court below deemed them sufficiently meritorious to warrant facial invalidation of the Act.

81 On the other hand, if the Court found appellees' claims substantial on the present record, the State would, of course, accept the costs of further delay for the opportunity to have its own courts put the Act in the best posture for an ultimate ruling sustaining its state *and* federal constitutionality.

A. ***Pullman* Abstention.**

Pullman's requirement of abstention is avoidable only by a clear showing that "no alternative to [federal] adjudication is open." 312 U.S. at 498. A state court alternative *is* open, however, whenever a definitive ruling on state law grounds might either present the federal claim in a different posture or permit its avoidance. *See Harris County Commissioners v. Moore*, 420 U.S. 77, 84 (1975). The policy of abstention has its most vital application precisely when a federal court believes it might be necessary to declare a complex state statutory scheme invalid on its face—particularly when that scheme undertakes social and economic reforms through the eminent domain power. In such a case, the potential for "needless friction with state policies is at its greatest." *Pullman*, 312 U.S. at 500. Where, as here, the constitutional claim is directed against the *face* of a state statutory scheme on grounds that, when viewed as an undifferentiated whole, it serves no legitimate public purpose but merely seeks to "appease the desires" of certain private persons, 702 F.2d at 793 (A10), a state law ruling narrowing, modifying, supplementing or substituting this challenged private purpose could dramatically recast the constitutional claim, moot it, or do both—by transforming the statewide facial question into a series of localized as-applied issues much like those presented, and held to require abstention, in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[82]

Abstention policies would have been well served in this case had the court below awaited the views of the Hawaii Supreme Court concerning the precise purposes of the Hawaii Land Reform Act in its many possible applications. Instead, the court below—disregarding the broad power of state courts to provide saving constructions of constitutionally vulnerable

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82 The court below erred not only in misapplying *Pullman* abstention doctrine, but also in misconstruing that doctrine to compel abstention only when the constitutional question " 'plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.' " 702 F.2d at 789 n.1 (A3). Such a reading of *Pullman* incorrectly constricts its scope by omitting state law rulings which might remold state laws so as to present the constitutional question in a materially different posture.

state laws[83]—preemptively (and indeed incorrectly, *see* I.A *supra*) construed the Act to have only the singular and narrow purpose of enabling a certain group of Hawaii residents to purchase the land on which they now reside, so as to confer private benefit on those residents. Having thus shriveled the aims of the Act, the Ninth Circuit felt entitled to denounce it as nothing more than "the instrument by which private property held by a minority . . . is to be redistributed to appease the desires of a landless majority to own residential land." 702 F.2d at 793 (A10).

Given the variety of purposes for condemnations under the Act elaborately set forth in the Act itself, the Ninth Circuit's refusal to abstain cannot be defended on the ground that the Act's *language* dictates the monolithic view of its purposes adopted below. And, had the advice of the Hawaii Supreme Court been sought, the court below could not have simply ignored the multiple and indisputably "public" purposes of the Act, *see* I.A *supra*. For even if the Ninth Circuit could conceivably hold that these antitrust and other public objectives were insufficiently articulated in the Act or in its legislative history to be among its permissible purposes, that court surely overstepped *Pullman* bounds in effectively precluding the Hawaii Supreme Court from issuing a definitive ruling that one or more of those public purposes *must* be included as among those contemplated by the Act in any assessment of its facial validity.

In light of the starkly different posture of the constitutional claim that would result, the court below certainly erred in taking upon itself the task of declaring all such public purposes beside the point in construing the Act's true meaning and aim. When presented in a posture incorporating, for example, its antitrust purpose, the Act would satisfy even the strict test of "public use" propounded in the concurring opinion below—namely, that "the private benefit must be an incidental one,

83 *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) (states are "free to allocate the lawmaking function to whatever branch of state government they may choose," and thus to delegate to their own agencies or courts as much of a legislative second-guessing function in enforcing state, albeit not federal, constitutional norms as they wish); *cf. id.* at 479-81 (Stevens, J., dissenting).

and not the dominant purpose of the taking." A34. Indeed, the entire federal controversy might well have been avoided, and might even now be averted, by affording state courts a definitive opportunity further to identify the nature and priorities of the Act's various purposes. For even appellees concede that the object of reducing inflated land values and the overall cost of living is a "legitimate" public purpose. *See* Motion to Affirm in Nos. 83-141 & 83-283, at 27. Appellees contest the economic wisdom of the Act as a means of fighting inflation. *See id.* But even if appellees' unprecedented demand for such extraordinary second-quessing of the economic efficacy of the Act were acceptable, it would simply underscore the necessity of abstention. For it is inconceivable that any federal court could properly conduct so intrusive an inquiry when, in view of a federal court's lack of the "legislative" power possessed by state courts, that inquiry would at best lead to a constitutional ruling based on an incomplete record of support for the Act in question. Abstention is thus the only appropriate alternative.

In essence, abstention is required to allow the Hawaii courts to conclude the final stage of the state's legislative process—the stage in which the state's courts specify and, if necessary, modify the meaning and supporting factual foundation for enacted laws to save them not only from condemnation under the United States Constitution but also from invalidation under the state constitution—here, Section 20, Article I, of the Constitution of Hawaii. Thus, appellees' complaint that there are no restrictions on lessees' post-acquisition use of the property, or that the HHA is not required by the Act to condemn and transfer lots in numbers sufficient to have the desired anti-inflationary effect, while raising no legitimate federal issue, might be found by the state courts to raise serious questions under the state charter. To save the Act—and incidentally make it possible for federal courts to avoid the federal constitutional challenge entirely—the state courts could choose to sustain the legislation by imposing certain conditions on the Act's deployment of the eminent domain power.[84]

84 The meticulous way in which the state's courts have both required administrative hearings by the HHA into the "public use" issue and re-examined that issue in judicial trials casts doubt on any surmise that Hawaii's "public use" requirement is but a "mirror image" of the Fourteenth Amend-

Because the federal court below lacked authority to take any such step, its refusal to abstain required it precipitously to judge the Act on its face—and led it thereupon to void the Act indiscriminately and unnecessarily, as well as erroneously.

B. *Younger* Abstention.

Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts must dismiss constitutional claims that have been or could be presented in ongoing state proceedings. *Younger* extends to non-criminal proceedings when important state interests are involved, *see Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982), and its policies of equitable restraint are applicable generally "when [federal courts] are asked to oversee state law enforcement authorities," *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983). It is plain

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ment's due process clause, contrary to the court's suggestion below, *see* 702 F.2d at 800 (Poole, J., concurring) (A24); *see also id.* at 789-90 n.1 (A3-4). On the contrary, both the relevant text of the state's statutory and constitutional law—*see* Hawaii Rev. Stat. § 516-83(a)(12), and Hawaii Const. Art. I, § 20—and the practice to date under both, preclude any confident prognosis that Hawaii's judges and administrators will, under state law as authoritatively construed by the Hawaii Supreme Court, treat the findings of the Hawaii Legislature as deferentially as a federal court is bound to do. The Hawaii Supreme Court not only could revise or supplement those findings, but could even conclude that no construction or supplementation of the legislative record could save Chapter 516 from facial invalidation under Article I, § 20 of the Hawaii Constitution.

Nor, in any event, are those cases suggesting that abstention is not required in order merely to give the state a first chance to strike down its legislation under a state constitutional provision identical to a federal one even apposite. Section 20 is not the type of "broad and sweeping" constitutional guarantee of general application like the equal protection provision involved in *Examining Board v. Flores de Otero*, 426 U.S. 572, 597-98 (1976). And section 20 is not redundant of the Fifth Amendment, much less the Fourteenth, which contains no reference to public use except to the extent necessary to comply with the Supremacy Clause.

Indeed, if abstention is rejected in this case, it is difficult to see when, if ever, the state courts would have an opportunity to develop the meaning of their own constitutional restrictions on eminent domain power. To treat the Fifth Amendment's felicitous requirement of "a public use" like a trademark would rob the states not only of the means of elegant expression for their constitutional norms, but also of the opportunity to give content to those norms in important cases.

that enforcement of the Hawaii Land Reform Act through eminent domain proceedings implicates vitally important state interests going to the very core of Hawaii's sovereign prerogatives. *See Hawaii Housing Authority v. Midkiff,* 104 S. Ct. 7, 9 (1983) (Rehnquist, J., in chambers, denying stay); *Ahrensfeld v. Stephens,* 528 F.2d 193 (7th Cir. 1975). The force of *Younger* policies is magnified where, as here, the ongoing state proceedings, however characterized, effectively serve *both* as the final stage of the legislative process during which the state law's basic purposes, operation, and supporting factual record are refined as needed to shield it against indiscriminate facial nullification, *and* as a forum for the ventilation and vindication of federal constitutional claims. In practical terms, the state law is not fully operational—and, in Article III terms, perhaps not even ripe for facial challenge—until this last phase of the state lawmaking process has been completed. *Cf. City of Los Angeles v. Lyons.*[85]

The court below rejected the application of *Younger* to this case on the ground that there were no state proceedings of a judicial nature which were ongoing at the time the federal suit was filed on February 28, 1979, or before any action of substance was taken by the federal court in that suit. 702 F.2d at 790 n.1 (A4). The Ninth Circuit was in error.

First, condemnation actions brought by the State under the Land Reform Act, including one against Bishop Estate lots in Wai-Kahala Tract "C," Civ. No. 59202, were in fact pending in state courts before any action of substance had occurred in the federal suit. The state's condemnation complaint in Tract "C"

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85 To treat a facial challenge to the Act as premature until the state courts have been given the opportunity to correct potential infirmities in the law implements no unique policy, but rather basic principles that counsel against both advisory opinions, *City of Los Angeles v. Lyons,* 103 S. Ct. at 1668; *O'Shea v. Littleton,* 414 U.S. 488, 495 (1974), and imputations of disrespect for state allegiance to constitutional norms. *See Middlesex County Ethics Comm.,* 457 U.S. at 431. These principles, which derive both from Article III and from conceptions of federalism, have consistently been applied to bar federal courts from enjoining enforcement of newly enacted state statutes before they have been applied. *See Babbitt v. United Farm Workers,* 442 U.S. 289, 304 (1979); *American Federation of Labor v. Watson,* 327 U.S. 582, 598-99 (1946); *Alabama Federation of Labor v. McAdory,* 325 U.S. 450, 461-62 (1945).

was filed September 21, 1979; that case was pending in state court until January 21, 1981, when it was settled.[86] The court below deemed September 1979 too late for a state filing to trigger *Younger* because the district court had already granted a temporary restraining order on February 28, 1979—the date the federal suit was filed—and had already denied in relevant part the Bishop Estate's motion for a preliminary injunction, in an order issued June 8, 1979. *See* A30 (concurring opinion). But neither the *ex parte* federal award of the temporary restraining order on the day the federal complaint was filed, nor the later denial of a preliminary injunction regarding the constitutional questions presented here, was an action of substance on the merits; nor should the fact that the federal parties engage in adversarial and evidentiary proceedings on a motion for a preliminary injunction prevent state courts from thereafter obtaining preclusive jurisdiction for *Younger* purposes. Indeed, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court implicitly held that such federal decisions, even though forecasting the outcome on the merits, are too preliminary and contingent to constitute actions of substance on the merits for *Younger* purposes.[87]

86 State condemnation suits were also filed on September 21, 1979, against the Bishop Estate with respect to two sets of lots in Wai-Kahala Tract "H" (Civ. Nos. 59191 and 59201), subsequently settled.

87 In *Hicks*, a motion nominally styled one for a temporary restraining order was filed and a month later denied before any state criminal proceeding was initiated. *See* 422 U.S. at 353 n.1 (dissenting opinion). Both parties had filed numerous affidavits and other documents in federal court on the motion. Despite the district court's determination that there was an insufficient likelihood of plaintiffs' prevailing on the merits, 422 U.S. at 338, this Court held that the subsequently filed state criminal proceedings *preceded* any federal action of substance on the merits. That preliminary assessments of the merits by federal courts do not count as actions of substance is further confirmed by this Court's ruling in *Middlesex*, finding *Younger* applicable despite the fact that the district court had dismissed the complaint on abstention grounds and that a stay of state disciplinary proceedings pending appeal had been issued. *See also Hicks*, where *Younger*'s application also was not barred by the district court's decision finding plaintiffs' claims sufficiently meritorious to warrant convening a three-judge court, 422 U.S. at 338.

Different considerations would obviously obtain if the district court, here or in *Hicks*, had granted preliminary relief and the state had proceeded to file

In any event, a condemnation action against Bishop Estate lots in Wai-Kahala Tract "H," Civ. No. 55837, was in every real sense initiated when the HHA officially designated the property for condemnation on October 20, 1978—several months *before the federal complaint was even filed.* The Bishop Estate, in its Motion to Affirm in No. 83-236, at 2, describes the 1978 "administrative proceedings" leading to this designation as "proceedings . . . that, if uninterrupted, would ultimately have led to the involuntary condemnation of Trustees' fee title in various lots." Once a designation order has issued, in other words, a judicial condemnation proceeding is ordinarily *inevitable*: that judicial proceeding is thus "pending," for all practical purposes, from the date of designation. Indeed, the nexus between designation orders and condemnations is far closer than was the nexus between the disciplinary investigation and ruling of the ethics committee and the subsequent imposition of discipline by the state supreme court in *Middlesex,* where this Court concluded that the investigatory function performed by the committee was part of the judicial disciplinary proceeding so far as *Younger* was concerned.[88]

Second, even if no *condemnation actions* had been pending in state court before actions of substance had been taken in the federal suit, the undisputed pendency of *designation proceedings* in the HHA at the time the federal suit was initially filed sufficed to trigger *Younger.* The Ninth Circuit's holding to the contrary rests on an unsupportable presumption that such proceedings are insufficiently judicial in nature. The label the state attaches to such proceedings cannot, of course, be determinative. The crucial question is whether those proceedings afford an adequate opportunity for the federal plaintiffs to raise their federal constitutional objections against enforcement of the state law involved. The Act plainly obligates the

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state court actions in violation of the injunction. *See United States v. United Mine Workers,* 330 U.S. 258 (1946).

88 Doubt concerning the nexus between the designation decision and the condemnation trial raises a question of state law which should, of course, be resolved by the Hawaii Supreme Court. That court might well conclude that, under state law, even the *initiation* of a designation proceeding by public hearing on the question whether condemnation will serve the Act's public purposes constitutes part of the condemnation process. *Cf. Middlesex.*

HHA to hear and rule upon such claims in the course of determining whether the proposed condemnation will serve the Act's public purposes. Accordingly, the Bishop Estate submitted to the HHA its constitutional objections to the taking of its Kamiloiki Valley tract in advance of the public designation hearing held by the HHA with respect to that tract on February 22, 1979—six days before this federal suit was filed. *See* p. 10 *supra*.[89] That the HHA rejected the Estate's constitutional position hardly establishes that it was structurally "incompetent . . . to adjudicate the issues," including the federal constitutional issues, "pending before it," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1977).[90]

To the extent uncertainty persists as to whether the Hawaii Supreme Court or legislature regard HHA designation proceedings as judicial in nature, and whether the HHA is structured to hear and decide constitutional claims judiciously, the only proper course is abstention while the parties seek a ruling on the matter by the state courts. For the judicial capacity of the HHA is, of couse, purely a matter of state law. *See Middlesex*, 457 U.S. at 434; *Geiger v. Jenkins*, 316 F.Supp. 370, 372 (N.D.Ga. 1970), *aff'd* 401 U.S. 985 (1971).

At the very least, therefore, for the Ninth Circuit itself to rule—without the benefit of state judicial guidance—that "the public hearings before the [HHA] bear none of the attributes of a judicial proceeding," 702 F.2d at 802 n.5 (Poole, J., concurring) (A29); *id.* at 790 n.1 (opinion of Alarcon, J.) (A4), only compounded the violation of *Pullman* and *Thibodaux* and constituted an independent violation of *Burford v. Sun Oil Co.*, 319 U.S. 315, 325-32 (1943), in which this Court counseled against federal judicial guesswork about such peculiarly complex and specialized local matters as the relation of a

89 Such a public designation hearing was held with respect to certain Bishop Estate lots in Tract "H," Civ. No. 55837, as early as April 22, 1977.

90 Of course, if a designation decision is deemed the culmination of a *judicial* proceeding for *Younger* purposes, then failure to challenge a designation on appeal in the state judicial system in itself requires dismissal of this federal suit under *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Inasmuch as appellees failed to appeal the HHA's designation decision regarding Tract "H" entered October 20, 1978, *Huffman* should have led the district court to dismiss the federal complaint under *Younger* on that ground alone.

state's judicial to its administrative processes in allocating scarce natural resources. This simply was not a case, therefore, in which it could be said by a *federal* court that "the predicate for a *Younger v. Harris* dismissal was lacking." *Gibson*, 411 U.S. at 577.

CONCLUSION

The Ninth Circuit's invalidation of vital state legislation thus represented an impermissible assault on all three branches of state government. Had the federal challenge to the Land Reform Act been as serious as the circuit court deemed it, the only course consistent with our federal system would have been abstention or dismissal. Instead, having erroneously bypassed the state executive and judicial branches, the court below shattered all twentieth-century precedent by substituting its notions of Hawaii's land-use needs for those of the state legislature. No branch of any state's government may rest secure while so roving a commission is at large. To correct such federal judicial excess, this Court should reverse the judgment below.

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